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Taking on Big Money: How Caperion Will Change Judicial Disqualification Forever

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TAKING ON BIG MONEY: HOW *CAPERTON* WILL CHANGE JUDICIAL DISQUALIFICATION FOREVER

SCOTT B. GITTERMAN*

I.	INTRODUCTION.....	475
II.	BACKGROUND INFORMATION	476
III.	BEFORE <i>CAPERTON v. A.T. MASSEY COAL CO.</i>	478
	A. <i>When Disqualification is Necessary</i>	478
	1. Grounds for Disqualification	483
	a. <i>Actual Bias or Prejudice</i>	480
	b. <i>Pecuniary Interest</i>	482
	2. Landmark Decisions	483
	a. <i>Tumey v. Ohio</i>	483
	b. <i>Withrow v. Larkin</i>	484
	c. <i>Ward v. Village of Monroeville</i>	485
	d. <i>Aetna Life Insurance Co. v. Lavoie</i>	486
	e. <i>In re Murchison</i>	486
	f. <i>Mayberry v. Pennsylvania</i>	487
	B. <i>The Lead-Up to Caperton</i>	488
IV.	THE INTEGRATION OF <i>CAPERTON</i>	491
	A. <i>The Purpose of the Opinion</i>	491
	B. <i>The Court's New Financial Outlook</i>	491
V.	THE POSSIBLE IMPLICATIONS.....	492
	A. <i>The Potential Consequences of the Decision</i>	492
	B. <i>The Dissenters</i>	493
	1. Justice Roberts	494
	2. Justice Scalia.....	497
VI.	CONCLUSION	498

I. INTRODUCTION

In *Caperton v. A.T. Massey Coal Co.*,¹ the Supreme Court of the United States handed down a decision expressly mandating that judges disqualify

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1. 129 S. Ct. 2252 (2009).

themselves when a case involves their big donors.² The Supreme Court held that a judge must be disqualified when an interested party's spending created actual bias because it had a "disproportionate influence" on the ruling judge.³ The focal point of the decision is to show how campaign contributions can create grounds for necessary disqualification for elected judges—not just bias, prejudice, or pecuniary gain any more.⁴

This article will provide an overview of the recent Supreme Court decision in *Caperton*. Section II will showcase background information that led to the decision in *Caperton*. Section III will review the grounds that require a judge to be disqualified; and will discuss what led to the recent decision in *Caperton*. Section IV will begin by highlighting the purpose of the opinion; it will discuss the Court's new financial outlook toward mandatory disqualification. Section V will discuss the possible future consequences of the decision. The latter part of Section V will review the dissenting opinions that were entered in the decision. Section VI will discuss the writer's conclusion as to whether this decision will put an end to any sort of bias or prejudice that a litigant might have to face and whether this decision will do more harm than good.

II. BACKGROUND INFORMATION

The initial cost of judicial elections has continued to rise for years, and contributors are donating more than ever to try to gain favor among judges.⁵ The costs of running or keeping a judicial office has increased to such a degree that a judge must take donations or take the chance of losing.⁶ Therefore, more judges are susceptible to being bought by contributors giving large campaign contributions.⁷ The question of whether judges must disqualify themselves when a case involves one of their big donors is one that has been left unanswered for years. Hugh M. Caperton, the owner of various mining industries in West Virginia, sued A.T. Massey Coal Co. for tortious interference in 1998.⁸ The suit was brought because Mr. Caperton felt Mr. Don L. Blankenship, the chief executive officer of A.T. Massey Coal Co.,

2. *Id.* at 2265–66.

3. Adam Liptak, *Justices Issue Recusal Rule for Judiciary*, N.Y. TIMES, June 9, 2009, at A1.

4. *See Caperton*, 129 S. Ct. at 2263.

5. David Barnhizer, "On the Make": *Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361, 378 (2001).

6. *Id.*

7. *See id.*

8. *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 233 (W. Va. 2008), *rev'd* by 129 S. Ct. 2252 (2009).

interfered with his existing contracts and tried to devalue his mine in order to cause him to go into bankruptcy.⁹ A circuit court in West Virginia found A.T. Massey Coal Co. liable for tortious interference and awarded Caperton \$50 million in punitive and compensatory damages.¹⁰

Coincidentally, the race for West Virginia State Supreme Court of Appeals occurred in 2004.¹¹ The incumbent Justice Warren McGraw was being challenged by Brent Benjamin.¹² Mr. Blankenship opposed Justice McGraw being reelected because he felt McGraw was not the right person for the job.¹³ Blankenship spent \$3 million trying to get Justice McGraw off the bench and replaced with Benjamin.¹⁴ The race was won by Benjamin, and after the victory, Blankenship immediately filed his petition to have the State Supreme Court of Appeals re-hear his punitive damages case.¹⁵ Caperton moved to disqualify Justice Benjamin and two of the other sitting Justices under the Due Process Clause because of Blankenship's campaign involvement.¹⁶ Photographs of Chief Justice Maynard had been leaked to the public showing him vacationing with Blankenship in the French Rivera during the time the case was still pending.¹⁷ Chief Justice Maynard immediately disqualified himself from the proceedings after the pictures surfaced.¹⁸ Also, Justice Starcher granted Massey's disqualification motion because of the public criticism Justice Benjamin had received due to his involvement with Blankenship.¹⁹ However, Justice Benjamin dismissed the motion and commented that there was no sort of bias involved in the suit.²⁰

9. *Id.* at 232–33.

10. *Id.* at 233.

11. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2257 (2009).

12. *Id.*

13. *See id.*

14. *Id.*

15. *Id.* at 2258.

16. *Caperton*, 129 S. Ct. at 2257.

17. *Id.* at 2258.

18. *Id.*

19. *Id.* Justice Starcher commented: "Blankenship's bestowal of his personal wealth, [political tactics], and friendship have created a cancer in the affairs of this Court. And I have seen that cancer grow and grow I believe that my stepping aside in the instant case might be a step in treating that cancer" Penny J. White, "The Appeal" to the Masses, 86 DENV. U. L. REV. 251, 279 (2008) (quoting Notice of Voluntary Disqualification of the Hon. Larry V. Starcher, Justice of the Supreme Court of Appeals of West Virginia, *A.T. Massey Coal Co. v. Caperton*, No. 33350 (Feb. 15, 2008), reprinted in SAMPLE ET AL., BRENNAN CTR. FOR JUSTICE, FAIR COURTS: SETTING RECUSAL STANDARDS 19 (2008)).

20. *Caperton*, 129 S. Ct. at 2257–58.

In 2007, the West Virginia Supreme Court of Appeals reversed the \$50 million verdict against Blankenship and his company.²¹ Caperton wanted another hearing and moved to disqualify three of the five justices that sat for the prior trial.²² All but Justice Benjamin recused themselves, and the hearing was held; however, the verdict was reversed once again.²³ Justice Benjamin filed a concurring opinion in the *Caperton* case, where he defended his decision not to disqualify himself as well as the majority opinion.²⁴ Justice Benjamin, in his concurring opinion, stated he had no “‘direct, personal, substantial, [or] pecuniary interest’” in the result of the case.²⁵ Caperton then applied for and was granted certiorari to the Supreme Court of the United States.²⁶

III. BEFORE *CAPERTON v. A.T. MASSEY COAL CO.*

A. *When Disqualification is Necessary*

Judicial disqualification has been around longer than the Constitution itself.²⁷ Disqualification procedures were derived from English common law; however, the United States has developed the procedures into what they are now.²⁸ The Roman Code of Justinian and Jewish law also had provisions for the disqualification of judges based on the suspicion of bias or pecuniary gain.²⁹ In English common law, the “rule of necessity” required a judge to hear a case even if there was direct pecuniary gain, if there was no sufficient

21. *Id.* at 2258.

22. *Id.*

23. *Id.* “Not only is the majority opinion unsupported by the facts and existing case law, but it is also fundamentally unfair. Sadly, justice was neither honored nor served by the majority.” *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 284 (W. Va. 2008) (Albright, J., dissenting), *rev’d* by 129 Ct. 2252 (2009).

24. *See Caperton*, 679 S.E.2d at 258–309 (Benjamin, J., concurring).

25. *Id.* at 301. Justice Benjamin further noted that by adopting “a standard merely of ‘appearances,’ [he concluded], seems little more than an invitation to subject West Virginia’s justice system to the vagaries of the day—a framework in which predictability and stability yield to supposition, innuendo, half-truths, and partisan manipulations.” *Id.* at 306.

26. *Caperton*, 129 S. Ct. at 2259.

27. John A. Meiser, Note, *The (Non)Problem of a Limited Due Process Right to Judicial Disqualification*, 84 NOTRE DAME L. REV. 1799, 1803 (2009). “[D]isqualification’ describes the statutorily or constitutionally mandated removal of a judge (typically on motion by one of the parties), whereas ‘recusal’ refers to a judge’s voluntary decision to step down from a case . . .” *Id.* at 1802 n.29 (emphasis omitted).

28. *Id.* at 1803.

29. *Id.* at 1803–04.

substitute available.³⁰ Therefore, judges in early common law were only required to disqualify themselves in the slimmest of situations.³¹ All judges are different in their concepts of ethical conduct and in their motivations.³² Judicial disqualification matters will probably continue to be decided mainly on a case-by-case basis, and many additional decisions are likely to be essential in fleshing out the components of mandatory disqualification.³³ There are rules set in place to ensure judges uphold a level of impartiality when ruling in any type of case.³⁴ “[T]he importance of maintaining the appearance of impartiality in the judiciary” has always been at the heart of the American system.³⁵ The right to be heard in a neutral tribunal before an impartial judge is guaranteed in the Due Process Clause in the Constitution of the United States.³⁶

30. *Id.* at 1804; see Paul B. Lewis, *Systemic Due Process: Procedural Concepts and the Problem of Recusal*, 38 U. KAN. L. REV. 381, 383 (1990).

31. Meiser, *supra* note 27, at 1804.

32. Todd Lochner, *Judicial Recusal and the Search for the Bright Line*, 26 JUST. SYS. J. 231, 232 (2005).

33. *Id.*

34. See, e.g., MODEL CODE OF JUDICIAL CONDUCT, R. 2.11 (2007); see also *Cnty. of Santa Clara v. Superior Court*, 235 P.3d 21, 35 (Cal. 2010). “It is well established that the disqualification rules applicable to adjudicators are more stringent than those that govern the conduct of prosecutors and other government attorneys.” *Cnty. of Santa Clara*, 235 P.3d at 35 n.12 (citing *People v. Freeman*, 222 P.3d 177, 178 (Cal. 2010)).

35. *Wersal v. Sexton*, 613 F.3d 821, 846 (8th Cir. 2010) (en banc) (Bye, J., dissenting). Alexander Hamilton captured this need for an impartial judiciary when he wrote:

The benefits of the integrity and moderation of the judiciary have already been felt in more States than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men of every description ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today. And every man must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence and to introduce in its stead universal distrust and distress.

Id. (quoting THE FEDERALIST NO. 78, at 454 (Alexander Hamilton) (Am. Bar Ass’n ed., 2009)).

36. See *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 798–99 (1987) (citing *In re Oliver*, 333 U.S. 257, 273 (1948)). “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

1. Grounds for Disqualification

Judges are not afforded the same kind of “across-the-board ‘out’” that lawyers receive, even when they elect to join the judiciary.³⁷ Taking on the role of a judge could entail being an “impartial umpire” or a “trustee of the common law,” but whatever role the judge has, he cannot let individual moral judgment get in the way of applying just the law.³⁸ “The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. . . . An important safeguard against such merely individual judgment is an alert deference”³⁹

Under the 2007 ABA Model Code of Judicial Conduct, a judge has an obligation to disqualify himself “in any proceeding in which the judge’s impartiality might reasonably be questioned.”⁴⁰ The grounds for which a judge is to be disqualified from hearing a case include when there is actual bias or prejudice against an interested party.⁴¹ Another ground for disqualification is when the judge has a pecuniary interest in the outcome of the case.⁴²

a. *Actual Bias or Prejudice*

A judge must be disqualified in cases where actual bias or prejudice can be shown.⁴³ However, this is a hard burden to prove because there is a presumption that judges are impartial whenever trying a case.⁴⁴ In Black’s Law

37. Sarah M. R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1, 28 n.133 (2007). For instance, a judge cannot avoid ruling on a mass tort case “just because she thinks it would be too time consuming or” inject personal feelings while he is involved in a case. *Id.* at 20 n.93. This ought to mean not only that he will not decline the case, but that he will not let his personal views into the rationale and decision of the case to affect the outcome of the proceeding. *Id.* This is all part of the duty of being a judge. *Id.*

38. *Id.* at 28 n.133.

39. *Adamson v. California*, 332 U.S. 46, 68 (1947) (Frankfurter, J., concurring).

40. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007).

41. *Id.* R. 2.11(A)(1). A judge shall disqualify himself if he has “a personal bias or prejudice concerning a party or a party’s lawyer.” *Id.*

42. *Id.* R. 2.11(A)(2)(c). A judge shall disqualify himself when the judge knows that the judge, the judge’s spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is a person who has more than a de minimis interest that could be substantially affected by the proceeding.

Id. R. 2.11(A)(2), (A)(2)(c).

43. *See MacDonald v. Ford Motor Co.*, 324 N.W.2d 489, 491 (Mich. Ct. App. 1982) (per curiam).

44. *See id.*

Dictionary, the phrase “actual bias” is defined as “[g]enuine prejudice that a judge, juror, witness, or other person has against some person or relevant subject.”⁴⁵ Also, the word “prejudice” is defined in Black’s Law Dictionary as “[d]amage or detriment to one’s legal rights or claims.”⁴⁶ Judges are not perfect; prejudice and bias cannot always be kept out of court.⁴⁷ “Judges are human beings, and so they can never completely transcend the limits of their own experiences and perspectives.”⁴⁸ In *Public Utilities Commission of the District of Columbia v. Pollak*,⁴⁹ Justice Frankfurter commented:

The judicial process demands that a judge move within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted.⁵⁰

Actual bias and prejudice really matter “when it moves the decision[maker] away from reasoning or outcomes that are in accordance with the law and towards those that are in accordance with something else (e.g., personal, non-legal reasons).”⁵¹ The burden to show that a judge is biased for or against a party, or that prejudice has been shown, is on the shoulders of the petitioners.⁵² In order for a judge to be disqualified, the bias or prejudice must also be personal rather than judicial.⁵³ An interested party is “entitled to a judge who will hear both sides and decide an issue on the merits of the

45. BLACK’S LAW DICTIONARY 145 (9th ed. 2009). The term “bias” is defined as: “[i]nclination; prejudice; [or] predilection.” *Id.*

46. *Id.* at 1018. Legal prejudice is defined as: “A condition that, if shown by a party, will usu[ally] defeat the opposing party’s action; esp[ecially], a condition that, if shown by the defendant, will defeat a plaintiff’s motion to dismiss a case without prejudice.” *Id.*

47. *See Bracy v. Schomig*, 286 F.3d 406, 426 (7th Cir. 2002).

48. *Id.*

49. 343 U.S. 451 (1952).

50. *Id.* at 466 (Frankfurter, J.) (explaining nonparticipation in decision).

51. Cravens, *supra* note 37, at 29.

52. *See Bracy*, 286 F.3d at 411.

53. *Alley v. State*, 882 S.W.2d 810, 821 (Tenn. Crim. App. 1994) (citing *State ex rel. Wesolich v. Goeke*, 794 S.W.2d 692, 697 (Mo. Ct. App. 1990)); *State v. Smith*, 242 N.W.2d 320, 324 (Iowa 1976).

law.”⁵⁴ However, an interested party is not guaranteed a judge with a clean slate.⁵⁵ “Each judge brings to the bench the experiences of life, both personal and professional. A lifetime of experiences that have generated a number of general attitudes cannot be left in chambers when a judge takes the bench.”⁵⁶ An interested party seeking judicial disqualification must visibly and affirmatively prove bias or prejudice.⁵⁷

In order to succeed on a motion to disqualify under the general rule, an interested party must demonstrate that conditions “exist which reflect pre-judgment of the case by the judge or a leaning of his mind in favor of one party to the extent that his decision in the matter is based on grounds other than the evidence placed before him.”⁵⁸ Also, the bias or prejudice must stem from an extrajudicial basis in order to be disqualifying.⁵⁹ If the bias or prejudice does not stem from an extrajudicial source, the judge is not required to disqualify himself unless his behavior demonstrates “pervasive bias” against a litigant.⁶⁰

b. *Pecuniary Interest*

Impartiality is missing when judges have a pecuniary interest in the result of the case.⁶¹ The Supreme Court has held that judges must disqualify themselves in situations where they have a pecuniary interest in fees, forfeitures, or fines payable by parties before them.⁶² Additionally, federal law requires judges be disqualified if they or any member of their family have a

54. *Madsen v. Prudential Fed. Servs. & Loans Ass’n*, 767 P.2d 538, 546 (Utah 1988); see *Alley*, 882 S.W.2d at 819.

55. *Madsen*, 767 P.2d at 546.

56. *Id.*; see also *Dep’t of Revenue v. Golder*, 322 So. 2d 1, 6 (Fla. 1975) (citing *Laird v. Tatum*, 409 U.S. 824, 835 (1972)).

57. *Cliche v. Fair*, 487 A.2d 145, 148 (Vt. 1984) (quoting *In re Shuttle*, 306 A.2d 667, 670 (Vt. 1973)).

58. *TZ Land & Cattle Co. v. Conduct*, 795 P.2d 1204, 1211 (Wyo. 1990) (quoting *Pote v. State*, 733 P.2d 1018, 1021 (Wyo. 1987)). The Due Process Clause frequently requires judges to disqualify “themselves when they face possible temptations to be biased, even when they exhibit no actual bias against a party or a case [sic].” Bruce A. Green, *May Judges Attend Privately Funded Educational Programs? Should Judicial Education be Privatized?: Questions of Judicial Ethics and Policy*, 29 *FORDHAM URB. L.J.* 941, 946 (2002) (quoting *Del Vecchio v. Ill. Dep’t of Corr.*, 31 F.3d 1363, 1372 (7th Cir. 1994) (en banc)).

59. See *Liteky v. United States*, 510 U.S. 540, 564 (1994) (Kennedy, J., concurring). The term “extrajudicial” is defined as: “Outside court; outside the functioning of the court system.” *BLACK’S LAW DICTIONARY* 521 (9th ed. 2009).

60. See *Liteky*, 510 U.S. at 551.

61. See *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); see generally 16B *AM. JUR. 2D Constitutional Law* § 582 (2004).

62. *Tumey*, 273 U.S. at 535.

pecuniary interest in the outcome of the proceeding.⁶³ No amount of money received by a judge is minor enough to fall within the maxim “de minimis non curat lex.”⁶⁴ Furthermore, in no case has the Court ever found any amount of money to be so trifling as to be overlooked, and it has been stated that any pecuniary interest of a judge in a case heard by the judge, however isolated, may disqualify the judge.⁶⁵

2. Landmark Decisions

There are a plethora of cases that helped shaped what modern disqualification law is today. However, *Caperton* has stepped in and changed the landscape of judicial disqualification forever.⁶⁶ The *Caperton* Court held that there were two instances where disqualification was necessary that place the facts of *Caperton* in perspective.⁶⁷ The first instance is where a judge has a pecuniary interest in the result of the proceeding.⁶⁸ The second instance is in criminal contempt hearings, where a judge has ruled in an earlier proceeding then went on to try and convict the same litigant.⁶⁹ These six landmark decisions illustrate these two distinct types of instances where judicial disqualification was required.

a. *Tumey v. Ohio*

The Court in *Tumey v. Ohio*⁷⁰ held that the Due Process Clause requires a judge to disqualify himself when he has “a direct, personal, substantial, [or]

63. 28 U.S.C. § 455(b)(4) (2006). A judge shall be disqualified if:

He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

Id. The term “‘financial interest’ means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party.” 28 U.S.C. § 455(d)(4); see generally Leslie W. Abramson, *Specifying Grounds for Judicial Disqualification in Federal Courts*, 72 NEB. L. REV. 1046 (1993).

64. *Rollo v. Wiggins*, 5 So. 2d 458, 462 (Fla. 1942) (en banc); see also *Tumey*, 273 U.S. at 531; *Conkling v. De Lany*, 91 N.W.2d 250, 255 (Neb. 1958); *In re Tullius*, 137 N.E.2d 312, 315 (Ohio Prob. Ct. 1955). The maxim “de minimis non curat lex” is defined as: “[t]he law does not concern itself with trifles.” BLACK’S LAW DICTIONARY 390 (9th ed. 2009).

65. See *Tumey*, 273 U.S. at 532.

66. See generally *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

67. *Id.* at 2259–61.

68. *Id.* at 2259–60.

69. *Id.* at 2261.

70. 273 U.S. 510 (1927).

pecuniary interest” in the outcome of the proceeding.⁷¹ In *Tumey*, the defendant was arrested, charged, and convicted with unlawfully possessing intoxicating liquor by a mayor of a village.⁷² Ed Tumey was fined \$100 and ordered to stay in jail until the time he could pay the fine.⁷³ Tumey moved to disqualify the Mayor because the Mayor had a pecuniary interest in sentencing him, thus requiring disqualification under the Fourteenth Amendment’s Due Process Clause.⁷⁴ The Mayor received a portion of his salary from performing judicial duties that were funded by the fines collected, and the monies collected from the fines went to the village treasury.⁷⁵ The Court held disqualification was necessary under the principle:

Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the [s]tate and the accused, denies the latter due process of law.⁷⁶

Therefore, the *Tumey* Court held the Due Process Clause of the Fourteenth Amendment required disqualification “both because of [the judge’s] direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village.”⁷⁷

b. *Withrow v. Larkin*

The Supreme Court in *Withrow v. Larkin*⁷⁸ held disqualification is required in circumstances where “the probability of actual bias on the part of

71. *Id.* at 523; see John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609 (1947). “The common law of disqualification . . . was clear and simple: a judge was disqualified for direct pecuniary interest and for nothing else.” *Id.* at 609. The Due Process Clause “may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.” *In re Murchison*, 349 U.S. 133, 136 (1955).

72. *Tumey*, 273 U.S. at 515.

73. *Id.*

74. *Id.*

75. *Id.* at 517, 520.

76. *Id.* at 532.

77. *Tumey*, 273 U.S. at 535. “A situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.” *Id.* at 534 (citing *City of Boston v. Baldwin*, 1 N.E. 417, 418 (Mass. 1885); *State ex rel. Colcord v. Young*, 12 So. 673, 676 (Fla. 1893)).

78. 421 U.S. 35 (1975).

the judge or decisionmaker is too high to be constitutionally tolerable.”⁷⁹ Some of those circumstances include: when the adjudicator has a pecuniary interest in the result⁸⁰ and when the judge has been a personal target of abuse or criticism from the parties.⁸¹ Furthermore, the *Withrow* Court held disqualification is necessary if “under a realistic appraisal of psychological tendencies and human weakness” the interest “poses such a risk of actual bias or prejudice that the practice must be forbidden if the guarantee of due process is to be adequately implemented.”⁸²

c. *Ward v. Village of Monroeville*

The Court, in *Ward v. Village of Monroeville*,⁸³ addressed whether a mayor’s court decision was allowable, even though the fines levied went to the town rather than to the mayor himself.⁸⁴ In *Ward*, the defendant was convicted of two traffic offenses and was assessed a fine.⁸⁵ The defendant argued his due process rights were infringed upon because the judge was not impartial.⁸⁶ Although the Mayor did not receive direct compensation from the fines imposed, the town received a monetary benefit from the fines.⁸⁷ The Court held that “the mere union of the executive power and the judicial power in him cannot be said to violate due process of law”⁸⁸ The test to decide whether disqualification is necessary in situations such as the mayor’s is one “which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused.”⁸⁹

79. *Id.* at 47.

80. *Id.* (citing *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972); *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 148–49 (1968) (discussing the consequences of pecuniary interests with regards to judges); *Tumey*, 273 U.S. at 523).

81. *Withrow*, 421 U.S. at 47 (citing *Taylor v. Hayes*, 418 U.S. 488, 501 (1974); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 578–79 n.2 (1968); *Ungar v. Sarafite*, 376 U.S. 575, 584 (1964)).

82. *Id.*

83. 409 U.S. 57 (1972).

84. *Id.* at 59–60.

85. *Id.* at 57.

86. *Id.* at 58.

87. *Id.*

88. *Ward*, 409 U.S. at 60 (quoting *Tumey v. Ohio*, 273 U.S. 510, 534 (1927)).

89. *Id.* (quoting *Tumey*, 273 U.S. at 532).

d. Aetna Life Insurance Co. v. Lavoie

In *Aetna Life Insurance Co. v. Lavoie*,⁹⁰ the Court required the disqualification of a state Supreme Court Justice where the Justice casts the deciding vote in a punitive damages award, while being the main witness in a very similar case in a lower court.⁹¹ The *Lavoie* Court further articulated:

The Due Process Clause “may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, ‘justice must satisfy the appearance of justice.’”⁹²

Additionally, the *Lavoie* Court emphasized that “what degree or kind of interest is sufficient to disqualify a judge from sitting ‘cannot be defined with precision.’”⁹³ Furthermore, the Court felt having an objective component in the test was essential.⁹⁴

e. In re Murchison

The *In re Murchison*⁹⁵ Court addressed instances where a judge shall be disqualified when they have no pecuniary interest, but a conflict still arises because the judge participated in an earlier proceeding.⁹⁶ The judge examined the petitioners to determine if charges of bribery and gambling should be assessed.⁹⁷ The first petitioner answered the judge’s questions, but the judge found the petitioner’s answers untruthful and charged him with perjury.⁹⁸ The second petitioner refused to answer the judge’s questions because he did not have counsel, which was required by state law.⁹⁹ The judge

90. 475 U.S. 813 (1986).

91. *Id.* at 828.

92. *Id.* at 825 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

93. *Id.* at 822 (quoting *In re Murchison*, 349 U.S. at 136).

94. *See id.* “The Due Process Clause demarks only the outer boundaries of judicial disqualification. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification” *Lavoie*, 475 U.S. at 828; *see also* *State v. Harris*, 786 N.W.2d 409, 424 (Wis. 2010). “[T]he difficulties of inquiring into actual bias . . . simply underscore the need for objective rules.” *Id.* (quoting *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2263 (2009)).

95. 349 U.S. 133 (1955).

96. *Id.* at 134.

97. *Id.*

98. *Id.*

99. *Id.* at 134–35.

proceeded to charge the second petitioner with contempt.¹⁰⁰ The judge then tried and convicted both petitioners.¹⁰¹ The Court set aside the criminal convictions because the judge had a conflict of interest due to the fact he participated in the trial and sentencing stage.¹⁰²

The Court explained the general rule that “no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.”¹⁰³ Therefore, disqualification was required by the judge in this situation because “[h]aving been a part of [the entire] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused.”¹⁰⁴ The Court concluded this point because “[a]s a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his ‘grand-jury’ secret session.”¹⁰⁵

f. *Mayberry v. Pennsylvania*

In *Mayberry v. Pennsylvania*,¹⁰⁶ the petitioner was tried for attempting to break out of prison and holding hostages inside a prison.¹⁰⁷ Mayberry represented himself in the proceedings.¹⁰⁸ The trial concluded with a verdict of guilt against Mayberry.¹⁰⁹ When the petitioner was brought in for sentencing the judge found him guilty of criminal contempt and sentenced him to a term of eleven to twenty-two years.¹¹⁰ The Court dismissed the criminal contempt charges because a litigant “should be given a public trial before a judge other than the one reviled by the contemnor.”¹¹¹ Therefore, the Court articulated the question to be asked when trying to decide whether disqualification is necessary is not whether the judge was biased, but whether the typical judge is going to be neutral, because if not, there will be an unconstitutional “potential for bias.”¹¹²

100. *In re Murchison*, 349 U.S. at 135.

101. *Id.*

102. *Id.* at 138–39.

103. *Id.* at 136.

104. *Id.* at 137.

105. *In re Murchison*, 349 U.S. at 138.

106. 400 U.S. 455 (1971).

107. *Id.* at 455.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Mayberry*, 400 U.S. at 466.

112. *Id.* at 465–66; *see Taylor v. Hayes*, 418 U.S. 488, 501 (1974).

Similarly, in *Offutt v. United States*,¹¹³ the defendant was charged and convicted of criminal contempt because he showed countless displays of disrespect to the judge during his trial for abortion.¹¹⁴ The Court held that a judge who had become personally involved in an antagonistic relationship with the litigant before him should have transferred the case to another judge based on the concept of justice.¹¹⁵

B. *The Lead-Up to Caperton*

The issue of whether large campaign contributions can constitute grounds for disqualification of a judge is a question that has been left unanswered for years.¹¹⁶ A large number of state court judges are elected and count on campaign contributions to help them win over the public and get elected.¹¹⁷ More likely than not, once such judges are elected, a case will come before them involving a person who donated to their judicial campaign.¹¹⁸ Once this happens, the opposing party will often file a motion to disqualify the judge based on lack of impartiality because of campaign contributions, but oftentimes these motions fail.¹¹⁹ The courts argue a reasonable person would not interpret a judge as being biased simply because a person has contributed to the judge's campaign.¹²⁰ Also, it would be unrealistic to

113. 348 U.S. 11 (1954).

114. *Id.* at 11–12.

115. *Id.* at 17–18.

[W]here conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place.

Cooke v. United States, 267 U.S. 517, 539 (1925).

116. James Sample & Michael Young, *Invigorating Judicial Disqualification: Ten Potential Reforms*, 92 JUDICATURE 26, 26 (2008). “The improper appearance created by money in judicial elections is one of the most important issues facing our judicial system today. A line needs to be drawn somewhere to prevent a judge from hearing cases involving a person who has made massive campaign contributions to benefit the judge.” *Id.* at 29. (quoting Theodore B. Olson, former U.S. Solicit. Gen.).

117. John Copeland Nagle, *The Recusal Alternative to Campaign Finance Legislation*, 37 HARV. J. ON LEGIS. 69, 87 (2000).

118. *Id.*

119. *Id.*; see *Shepherdson v. Nigro*, 5 F. Supp. 2d 305, 307 (E.D. Pa. 1998); *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 844–45 (Tex. Ct. App. 1987). In *Texaco Inc.*, a judge refused to disqualify himself after he received a large campaign contribution from Pennzoil's counsel after Pennzoil filed its answer. *Id.*; see also *Coley v. Bagley*, No. 1:02CV0457, 2010 WL 1375217, at *37 (N.D. Ohio Apr. 5, 2010); *Ala. Dep't of Pub. Safety v. Prince*, 34 So. 3d 700, 706 (Ala. Civ. App. 2009); see *In re Marriage of Thesing*, No. H034272, 2010 WL 602555, at *16–18 (Cal. Ct. App. 2010).

120. See Nagle, *supra* note 117, at 88.

expect to never see a campaign contributor, because it is an inevitable consequence to judicial elections.¹²¹

One court made a noteworthy statement when it wrote, “[t]he overriding priority . . . is to assure that our courts are impartial, and that they have the appearance of impartiality.”¹²² This sentiment alone should be the overriding factor in any case before any judge.¹²³ The problem of campaign contributions potentially creating bias is growing more and more, as elections become more expensive.¹²⁴ When judges refuse to disqualify themselves in situations where “their campaign finances reasonably call into question their impartiality,” the ABA has suggested the disqualification of any judge who accepted a large campaign contribution from a litigant appearing before them.¹²⁵

The ABA drafted a rule for campaign contributions: Disqualification is mandatory when a party, a party’s lawyer, or a party’s law firm has provided the judge aggregate contributions above a certain amount, within a certain amount of time.¹²⁶ One problem with the ABA rule is that, in states with reasonable restrictions, the possibility for apparent or real corruption is addressed by the restrictions, which no one may legally go beyond.¹²⁷ Another problem this rule invites is that gamesmanship could defeat its purpose.¹²⁸ “If the contribution threshold were set at a reasonable level, parties or lawyers could disqualify an unfavorable judge by making contributions . . .

121. *See* *Rocha v. Ahmad*, 662 S.W.2d 77, 78 (Tex. App. 1983).

A candidate for the bench who relies solely on contributions from nonlawyers must reconcile himself to staging a campaign on something less than a shoestring. If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts.

Id.

122. *Breakstone v. Mackenzie*, 561 So. 2d 1164, 1172 (Fla. 3d Dist. Ct. App. 1989) (en banc), *aff’d in part, quashed in part sub nom. MacKenzie v. Super Kids Bargain Store*, 565 So. 2d 1332, 1340 (Fla. 1990); *see also* *Wersal v. Sexton*, 613 F.3d 821, 844 (8th Cir. 2010) (en banc).

123. *Breakstone*, 561 So. 2d at 1172. *See* *Wersal*, 613 F.3d at 844 (Bye, C.J., dissenting).

124. *Sample & Young*, *supra* note 116, at 29.

125. Deborah Goldberg et al., *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 528–29 (2007). *See* *Sample & Young*, *supra* note 116, at 26; RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL DISQUALIFICATION OF JUDGES § 3.8 (3d ed. 1996). The concept that a party should be allowed “to peremptorily challenge a judge suspected of bias formed the basis for the . . . judicial disqualification statutes that” are still in place in most countries. *Id.*

126. *Sample & Young*, *supra* note 116, at 29. “Aggregate contributions’ are meant to include both direct and indirect gifts made to a candidate.” *Id.* (quoting MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(4) (2007)).

127. Goldberg et al., *supra* note 125, at 529.

128. *Id.*

above that amount to her campaign committee.”¹²⁹ These are the main reasons no state has adopted the per se ABA rule.¹³⁰ The states with reasonable limits to campaign contributions would be better off making a rule that requires disqualification after the acceptance of aggregate contributions of a set amount—not from a sole donor but jointly from all donors related to a litigant.¹³¹ Almost every court has discarded the thought that campaign contributions require judicial disqualification.¹³² Thus, the respondents in *Caperton* felt that if the Court imposed a “probability of bias” standard, it would also apply “to other types of support [that] a judge receives—including endorsements from newspapers, trade and labor organizations, and civic groups.”¹³³ The respondents in *Caperton* further argued that a “probability of bias” standard is unfeasible, because “it fails to propose “any test for distinguishing what the Constitution prohibits from what it permits.”¹³⁴ The respondents felt as though these types of judicial disqualification motions would encourage more unnecessary litigation.¹³⁵

Justice Benjamin’s behavior is nothing new to the Court.¹³⁶ Supreme Court Justice Hugo Black did not disqualify himself in a case involving his former law partner, which drew criticism from his fellow Justices.¹³⁷ Supreme Court Justice William Rehnquist drew harsh criticism for ruling in a case about a federally funded surveillance program that was started while he was still employed at the United States Department of Justice.¹³⁸ Additionally, Supreme Court Justice Antonin Scalia received harsh criticism from his fellow Justices and the legal community for taking part in a case involving then Vice President Dick Cheney, with whom he had recently gone hunting.¹³⁹ The legal community has high hopes that the *Caperton* decision has finally put to rest the issue of whether judicial disqualification is necessary in

129. *Id.*

130. *See id.* Before the decision in *Caperton*, Alabama was the only state that clearly required elected judges to disqualify themselves when major contributors were before them. Peter A. Joy, *A Professionalism Creed for Judges: Leading by Example*, 52 S.C. L. REV. 667, 675 n.28 (2001) (citing *Ex parte* Kenneth D. McLeod, Sr., Family Ltd. P’ship XV, 725 So. 2d 271, 274 (Ala. 1998) (per curiam)) [hereinafter *Ex Parte McLeod Family P’Ship*].

131. *See* Goldberg et al., *supra* note 125, at 529.

132. Conrad C. Daly & Evan Ennis, *Supreme Court Previews: Caperton v. Massey Coal Company* 08-22, FED. LAW, May 2009, at 62, 64 (Carrie Evans ed.).

133. *Id.*

134. *Id.*

135. *Id.*

136. *See* Meiser, *supra* note 27, at 1800–01.

137. *Id.* at 1801–02.

138. *Id.* at 1802.

139. *Id.*

cases involving a “probability of bias” when judges are hearing cases involving their big donors.

IV. THE INTEGRATION OF *CAPERION*

A. *The Purpose of the Opinion*

The Court in *Caperton* held that a judge must now disqualify himself in cases involving big donors where there is a “probability of bias.”¹⁴⁰ Judicial autonomy “declines in direct proportion to a judge’s [reliance] on others for [monetary] support” in order to get and keep judicial office.¹⁴¹ A judge’s need to gain or keep judicial office is at the “heart of judicial corruption.”¹⁴² “Anecdotal evidence suggests that judicial candidates believe that being able to outspend opponents is critical to winning elections.”¹⁴³ Thus, this decision has determined that a judge must disqualify himself in cases involving the judge’s big donors to avoid ruining the judge’s own reputation, as well as the integrity of the judgment and the court system as a whole.¹⁴⁴ However, the Court has stipulated that not every campaign contribution by an interested party or the party’s attorney creates a probability of bias that requires a judge’s disqualification.¹⁴⁵

B. *The Court’s New Financial Outlook*

The inquiry into whether a judge must now disqualify himself depends on the contribution’s relative amount compared to the total sum of money given to the campaign, the entire amount spent in the election, and the obvious effect the contribution had on the result of the election.¹⁴⁶ The *Caperton* Court noted that:

140. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2263–64 (2009); see *State v. Cooke*, No. 0506005981, 2010 WL 3734113, at *34 (Del. Super. Ct. Aug. 19, 2010); see also *Priceline.com, Inc. v. City of Anaheim*, 103 Cal. Rptr. 3d 521, 536 (Cal. 4th Dist. Ct. App. 2010).

141. Barnhizer, *supra* note 5, at 370.

142. *Id.* at 394.

143. Aman McLeod, *Bidding for Justice: A Case Study About the Effect of Campaign Contributions on Judicial Decision-Making*, 85 U. DET. MERCY L. REV. 385, 388 (2008) (citing Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 457 (1988)).

144. Daly & Ennis, *supra* note 132, at 63.

145. *Caperton*, 129 S. Ct. at 2263. The Court in *Lavoie* determined that some pecuniary interests are “too remote and insubstantial” to be disqualifying. *Id.* (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 826 (1986)).

146. *Id.* at 2264.

[T]here is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.¹⁴⁷

“The temporal relationship between the campaign contributions, the justice’s election, and the pendency of the case is also critical” when determining whether a campaign contribution should disqualify a judge.¹⁴⁸ Judicial integrity is an essential state interest.¹⁴⁹ Therefore, it is of the upmost importance to make sure every case comes before an impartial judge.¹⁵⁰ The Court reiterated the point that states may decide to “adopt recusal standards more rigorous than due process requires.”¹⁵¹ The Court further commented that “the codes of judicial conduct provide more protection than due process requires” and that the majority of disputes over judicial disqualification could be solved without turning to the Constitution.¹⁵²

V. THE POSSIBLE IMPLICATIONS

A. *The Potential Consequences of the Decision*

The decision in *Caperton* will have a drastic impact on elected judges who receive campaign contributions from supporters.¹⁵³ The decision further changes the grounds for disqualification to include a benefit a judge receives, rather than a payment.¹⁵⁴ From this point on, judges must disqualify themselves in cases involving their big donors if a motion for disqualification is filed in a timely fashion.¹⁵⁵ This new standard of necessary disqualification for judges could cause federalism problems because this new rule requires all states to throw away their disqualification procedures and to adopt a universal standard.¹⁵⁶ The federal government has put its foot down when it comes to disqualification when there is a “probability of bias,” thereby invading

147. *Id.* at 2263–64; *Wersal v. Sexton*, 613 F.3d 821, 839 (8th Cir. 2010) (en banc).

148. *Caperton*, 129 S. Ct. at 2264.

149. *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring).

150. *See Caperton*, 129 S. Ct. at 2265–66.

151. *Id.* at 2267 (quoting *White*, 536 U.S. at 794 (Kennedy, J., concurring)).

152. *Id.*

153. *Daly & Ennis*, *supra* note 132, at 63.

154. *Id.*

155. *See id.*

156. *Meiser*, *supra* note 27, at 1831.

states rights that were supposed to be protected by the idea of federalism.¹⁵⁷ The Court has even commented that federalism problems might limit the power the federal government has over the state courts.¹⁵⁸

In *Gregory v. Ashcroft*,¹⁵⁹ the Court faced the issue of whether state-imposed age qualifications were constitutionally permissible.¹⁶⁰ The Court held, “Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers. For this reason, ‘it is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides’ this balance.”¹⁶¹ This new disqualification standard should be interpreted as a means to force judges to disqualify themselves, not as a measure to give interested parties any new due process rights.¹⁶² Therefore, this new burden on judges to prove there is no bias for or against any litigant is in no way in line with the belief that judges are sworn to administer unbiased justice.¹⁶³

B. *The Dissenters*

Justices Roberts and Scalia both authored dissenting opinions in *Caperton* because they each felt the decision left too much open for discussion.¹⁶⁴ They shared the view that this decision would come back and haunt the Court for years to come.¹⁶⁵ Furthermore, both of the Justices share the prediction that this decision would clog up the judiciary with unnecessary dis-

157. *Id.* at 1831–32. The Fourteenth Amendment was not supposed to weaken the idea of federalism, leaving states at the mercy of the federal government. See Steven G. Calabresi, *We Are All Federalists, We Are All Republicans: Holism, Synthesis, and the Fourteenth Amendment*, 87 GEO. L.J. 2273, 2301 (1999) (reviewing AKHIL REID AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998)). The Fourteenth Amendment is an element of a bigger constitutional system that incorporates certain structural features, such as federalism, and it is through this light that it should be explained. *Id.*

158. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

159. 501 U.S. 452 (1991).

160. *Id.* at 455.

161. *Id.* at 460 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985), *superseded by statute*, 42 U.S.C. § 2000d-7(a)(1)).

162. Meiser, *supra* note 27, at 1833.

163. *Id.*

164. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2267 (2009) (Roberts, C.J., dissenting).

165. See *id.* at 2274 (Roberts, C.J., dissenting); *Id.* (Scalia, J., dissenting).

qualification motions and as a pitfall of this the American citizens would lose respect for the bench.¹⁶⁶

1. Justice Roberts

Justice Roberts felt the majority's decision will not promote the values of judicial impartiality, but rather undermine them.¹⁶⁷ He viewed the Court's interpretation that the Due Process Clause now requires judges to disqualify themselves because of a "probability of bias" as a misinterpretation.¹⁶⁸ Justice Roberts urged that a "probability of bias" cannot always be looked at in a defined way.¹⁶⁹ Justice Roberts felt the majority's new rule requiring judicial disqualification provided no direction to judges and interested parties about when disqualification will be constitutionally necessary.¹⁷⁰ He proposed forty fundamental questions that all federal and state court judges must answer to decide if they are required to disqualify themselves in any matter before them.¹⁷¹ All members of the judiciary take an oath to apply the law

166. *Id.* at 2274 (Roberts, C.J., dissenting); *id.* (Scalia, J., dissenting); see also *People v. Aceval*, 781 N.W.2d 779, 782–83 (Mich. 2010); *Marek v. State*, 14 So. 3d 985, 1000 (Fla. 2009) (per curiam); *Bradbury v. Eismann*, No. CV-09-352-S-BLW, 2009 WL 3443676, at *3–4 (D. Idaho Oct. 20, 2009), *aff'd* by 395 F. App'x 410 (9th Cir. 2010); see generally *State v. Allen*, 778 N.W.2d 863 (Wis. 2010) (per curiam); *U.S. Fid. Ins. & Guar. Co. v. Mich. Catastrophic Claims Ass'n*, 773 N.W.2d 243 (Mich. 2009).

167. *Caperton*, 129 S. Ct. at 2267 (Roberts, C.J., dissenting).

168. *Id.*

169. *Id.*

170. *Id.* The Court's failure to express a "judicially discernable and manageable standard" strongly counsels against the recognition of a novel constitutional right." *Id.* at 2272 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004)).

171. See *Caperton*, 129 S. Ct. at 2269–72 (Roberts, J., dissenting). Justice Roberts proposed these forty fundamental questions that state and federal judges will now have to determine:

- (1) How much money is too much money? What level of contribution or expenditure gives rise to a "probability of bias"?
- (2) How do we determine whether a given expenditure is "disproportionate"? Disproportionate to what?
- (3) Are independent, non-coordinated expenditures treated the same as direct contributions to a candidate's campaign? What about contributions to independent outside groups supporting a candidate?
- (4) Does it matter whether the litigant has contributed to other candidates or made large expenditures in connection with other elections?
- (5) Does the amount at issue in the case matter? What if this case were an employment dispute with only \$10,000 at stake? What if the plaintiffs only sought non-monetary relief such as an injunction or declaratory judgment?
- (6) Does the analysis change depending on whether the judge whose disqualification is sought sits on a trial court, appeals court, or state supreme court?
- (7) How long does the probability of bias last? Does the probability of bias diminish over time as the election recedes? Does it matter whether the judge plans to run for reelection?
- (8) What if the "disproportionately" large expenditure is made by an industry association, trade union, physicians' group, or the plaintiffs' bar? Must the judge recuse in all cases that affect the association's interests? Must the judge recuse in all cases in which a party or lawyer is a member of that group? Does it matter how much the litigant contributed to the

association? (9) What if the case involves a social or ideological issue rather than a financial one? Must a judge recuse from cases involving, say, abortion rights if he has received “disproportionate” support from individuals who feel strongly about either side of that issue? If the supporter wants to help elect judges who are “tough on crime,” must the judge recuse in all criminal cases? (10) What if the candidate draws “disproportionate” support from a particular racial, religious, ethnic, or other group, and the case involves an issue of particular importance to that group? (11) What if the supporter is not a party to the pending or imminent case, but his interests will be affected by the decision? Does the Court’s analysis apply if the supporter “chooses the judge” not in *his* case, but in someone else’s? (12) What if the case implicates a regulatory issue that is of great importance to the party making the expenditures, even though he has no direct financial interest in the outcome . . . ? (13) Must the judge’s vote be outcome determinative in order for his non-recusal to constitute a due process violation? (14) Does the due process analysis consider the underlying merits of the suit? Does it matter whether the decision is clearly right (or wrong) as a matter of state law? (15) What if a lower court decision in favor of the supporter is affirmed on the merits on appeal, by a panel with no “debt of gratitude” to the supporter? Does that “moot” the due process claim? (16) What if the judge voted against the supporter in many other cases? (17) What if the judge disagrees with the supporter’s message or tactics? What if the judge expressly *disclaims* the support of this person? (18) Should we assume that elected judges feel a “debt of hostility” towards major *opponents* of their candidacies? Must the judge recuse in cases involving individuals or groups who spent large amounts of money trying unsuccessfully to defeat him? (19) If there is independent review of a judge’s recusal decision, *e.g.*, by a panel of other judges, does this completely foreclose a due process claim? (20) Does a debt of gratitude for endorsements by newspapers, interest groups, politicians, or celebrities also give rise to a constitutionally unacceptable probability of bias? How would we measure whether such support is disproportionate? (21) Does close personal friendship between a judge and a party or lawyer now give rise to a probability of bias? (22) Does it matter whether the campaign expenditures come from a party or the party’s attorney? If from a lawyer, must the judge recuse in every case involving that attorney? (23) Does what is unconstitutional vary from State to State? What if particular States have a history of expensive judicial elections? (24) Under the majority’s “objective” test, do we analyze the due process issue through the lens of a reasonable person, a reasonable lawyer, or a reasonable judge? (25) What role does causation play in this analysis? . . . (26) Is the due process analysis less probing for incumbent judges—who typically have a great advantage in elections—than for challengers? (27) How final must the pending case be with respect to the contributor’s interest? What if, for example, the only issue on appeal is whether the court should certify a class of plaintiffs? Is recusal required just as if the issue in the pending case were ultimate liability? (28) Which cases are implicated by this doctrine? Must the case be pending at the time of the election? Reasonably likely to be brought? What about an important but unanticipated case filed shortly after the election? (29) When do we impute a probability of bias from one party to another? Does a contribution from a corporation get imputed to its executives, and vice-versa? Does a contribution or expenditure by one family member get imputed to other family members? (30) What if the election is nonpartisan? What if the election is just a yes-or-no vote about whether to retain an incumbent? (31) What type of support is disqualifying? What if the supporter’s expenditures are used to fund voter registration or get-out-the-vote efforts rather than television advertisements? (32) Are contributions or expenditures in connection with a primary aggregated with those in the general election? What if the contributor supported a different candidate in the primary? Does that dilute the debt of gratitude? (33) What procedures must be followed to challenge a state judge’s failure to recuse? May *Caperton* claims only be raised on direct review? . . . (34) What about state-court cases that are already closed? . . . (35) What is the proper remedy? After a successful *Caperton* motion, must the parties start from scratch before the lower courts? Is any part of the lower court judgment retained? (36) Does a litigant waive his due process claim if he waits until after decision to raise it? Or would the claim only be ripe after decision, when the judge’s actions or vote suggest a probability of bias? (37) Are the parties entitled to discovery with respect to the judge’s recusal decision? (38) If a judge erroneously fails to recuse, do we apply harmless-

impartially and uphold the Constitution, and they should be trusted to live up to this standard.¹⁷² Furthermore, Justice Roberts felt there were only two situations where the Due Process Clause requires disqualification: 1) “when the judge has a financial interest in the outcome of the case” and 2) when a judge presides over certain types of criminal contempt hearings.¹⁷³ In most instances, the Constitution of the United States leaves the issues of judicial disqualification and judicial ethics to be handled by state legislators.¹⁷⁴ Justice Roberts further commented that questions of disqualification are regulated by statute, common law, and by the ethics boards of the bar and bench.¹⁷⁵ In any particular case, a number of factors could lead to prejudice or the appearance of bias.¹⁷⁶ Those factors could include: prior employment history, friendship with a party or the party’s lawyer, religious affiliation, and many more situations.¹⁷⁷ Furthermore, never before has the Court ruled that the “probability of bias” required disqualification in any case.¹⁷⁸

Justice Roberts sees the majority’s decision leaving judges at the federal and state level “to act as political scientists (why did candidate X win the election?), economists (was the financial support disproportionate?), and psychologists (is there likely to be a debt of gratitude?).”¹⁷⁹ He feels this decision will lead to a clogging of our judicial system with unnecessary *Caperton* motions.¹⁸⁰ Justice Roberts is also of the opinion that opening the

error review? (39) Does the *judge* get to respond to the allegation that he is probably biased, or is his reputation solely in the hands of the parties to the case? (40) What if the parties settle a *Caperton* claim as part of a broader settlement of the case? Does that leave the judge with no way to salvage his reputation? *Id.*

172. *Id.* at 2267 (Roberts, J., dissenting) (citing *Republican Party of Minn. v. White*, 536 U.S. 765, 796 (2002)).

173. *Id.* at 2267 (Roberts, J., dissenting).

174. *Green*, *supra* note 58, at 947 (citing *Del Vecchio v. Ill. Dep’t of Corr.*, 31 F.3d 1363, 1391 (7th Cir. 1994) (en banc) (Easterbrook, J., concurring)). “All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.” *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

175. *Caperton*, 129 S. Ct. at 2268 (Roberts, J., dissenting) (citing *Bracy v. Gramley*, 520 U.S. 899, 904 (1997)). “[M]ost questions concerning a judge’s qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard.” *Bracy*, 520 U.S. at 904.

176. *Caperton*, 129 S. Ct. at 2268 (Roberts, J., dissenting).

177. *Id.*

178. *Id.*

179. *Id.* at 2272.

180. *Id.* at 2273; *see Zurita v. Lombana*, 322 S.W.3d 463, 470 n.1 (Tex. Ct. App. 2010). In *Zurita*, the appellants made a *Caperton* motion claiming that there was sufficient evidence to show actual bias by the trial judge. *Id.* The appellate court dismissed this motion and held the facts were not applicable to the *Caperton* holding. *Id.*; *see also Fine v. Sheriff of L.A. Cnty.*, 356 Fed. App’x 998, 999 (9th Cir. 2009); *Smith v. Bender*, No. 09-1003, 2009 WL

door to disqualification motions under the Due Process Clause brought under claims of “probability of bias” will “diminish the confidence of the American people in the fairness and integrity of their courts.”¹⁸¹

2. Justice Scalia

Justice Scalia points out the majority’s reasoning for implementing this new disqualification rule was to keep the public’s confidence in the judicial system.¹⁸² He urges that this ruling will have the opposite effect due to all the unnecessary *Caperton* motions that will be passing through the court system.¹⁸³ Justice Scalia also feels a plethora of billable hours will be wasted by attorneys reading through countless volumes of campaign finance reports, and countless more in contesting non-disqualification decisions through every available means possible as a result of the *Caperton* decision.¹⁸⁴

Also, Justice Scalia poses the question: “[S]hould judges sometimes re-use even where the clear commands of our prior due process law do not require it?”¹⁸⁵ He feels some imperfections and wrongs are nonjusticiable and that is why it is sometimes ineffective to try to right every wrong that comes before the Court.¹⁸⁶ Therefore, Justice Scalia feels some problems with the Constitution cannot be fixed, and trying to fix them will only lead to more harm.¹⁸⁷

2902563, at *3 (10th Cir. Sept. 11, 2009), *cert. denied*, 130 S. Ct. 2097 (2010); W.T. and K.T. *ex rel. J.T. v. Bd. of Educ. of the Sch. Dist. of N.Y.C.*, 716 F. Supp. 2d 270, 285–86 (S.D.N.Y. 2010); *Wilson v. Warden*, No. 3:10-cv-54, 2010 WL 717273, at *4 (S.D. Ohio Mar. 1, 2010); *Henry v. Jefferson Cnty. Comm’n*, No. 3:06-CV-33, 2009 WL 2857819, at *2–6 (N.D. W. Va. Sept. 2, 2009); *Blackwell v. United States*, No. 2:08-cv-00168, 2009 WL 6315322, at *41 (S.D. Ohio Sept. 22, 2009); *Valente v. Univ. of Dayton*, No. 3:08-cv-225, 2009 WL 4255508, at *4 (S.D. Ohio Nov. 19, 2009); *Weisshaus v. New York*, No. 08 Civ. 4053(DLC), 2009 WL 4823932, at *3 (S.D.N.Y. Dec. 15, 2009); *Littrell v. United States*, No. 4:07CV1707 CDP, 2009 WL 5220156, at *5 (E.D. Mo. Dec. 31, 2009); *Rhiel v. Hook (In re Johnson)*, 408 B.R. 123, 127 (Bankr. S.D. Ohio 2009); *People v. Garza*, No. E049043, 2010 WL 3530425, at *1–2 (Cal. 4th Dist. Ct. App. Sept. 13, 2010); *E.I. DuPont de Nemours & Co. v. Aquamar S.A.*, 24 So. 3d 585, 585–86 (Fla. 4th Dist. Ct. App. 2009) (per curiam); *In re Marriage of O’Brien*, 912 N.E.2d 729, 742–43 (Ill. App. Ct. 2009).

181. *Caperton*, 129 S. Ct. at 2274 (Roberts, C.J., dissenting).

182. *Id.* at 2274 (Scalia, J., dissenting).

183. *Id.*; see *United States v. Basciano*, 382 Fed. App’x 28, 33 (2d Cir. 2010); *Gaddy v. Brewer*, No. 1:10-cv-59-LG-RHW, 2010 WL 3025025, at *2 (S.D. Miss. June 18, 2010).

184. *Caperton*, 129 S. Ct. at 2274 (Scalia, J., dissenting).

185. *Id.* at 2275; see *Bauer v. Shepard*, 634 F. Supp. 2d 912, 949–50 (N.D. Ind. 2009), *aff’d* by 620 F.3d 704 (7th Cir. Ind. 2010).

186. See *Caperton*, 129 S. Ct. at 2275 (Scalia, J., dissenting).

187. See *id.*

VI. CONCLUSION

The decision in *Caperton* will change the landscape of the legal community in more ways than one. *Caperton* will allow litigants to always have a fair tribunal before an impartial judge.¹⁸⁸ However, I have to agree with the dissenting opinions in this case. Both of the dissenting Justices warn of the ramifications this case will bring because of unnecessary disqualification motions that will plague our judicial system as a result.¹⁸⁹ The majority failed to set up any framework for state and federal judges to look at in order to determine if they should be disqualified.¹⁹⁰

Judicial autonomy is at the heart of the Constitution.¹⁹¹ The Framers gave federal judges life terms and protected their salaries from Congress to make them independent and not susceptible to outside influence.¹⁹² Therefore, taking away a judge's freedom to decide if he should be disqualified ultimately turns into an outcome-oriented affair.¹⁹³ From this point on, or until the *Caperton* decision is modified, litigants, journalists, and other concerned individuals will search for grounds to challenge a judge's impartiality.¹⁹⁴ There is also the pitfall of not having enough state or federal justices at the Supreme Court level to constitute a quorum to even hear the case.¹⁹⁵ The biggest advantage of leaving the decision to judges to disqualify themselves was that it stopped "judicial forum shopping."¹⁹⁶ The new *Caperton* disqualification standard will unavoidably encourage the concept.¹⁹⁷ In the aftermath of the *Caperton* scandal, former Chief Justice Maynard lost his seat on the West Virginia Supreme Court of Appeals, and likely, Justice Benjamin will not be far behind him.¹⁹⁸ West Virginia and many other states are

188. *Id.* at 2259 (citing *In re Murchison*, 349 U.S. 133, 136 (1955)).

189. *Id.* at 2274 (Roberts, C.J., dissenting); *id.* (Scalia, J., dissenting).

190. *Caperton*, 129 S. Ct. at 2267 (Roberts, C.J., dissenting).

191. Jack N. Rakove, *The Original Justifications for Judicial Independence*, 95 GEO. L.J. 1061, 1062 (2007).

192. *Id.*; see also Cravens, *supra* note 37, at 18–21 (pointing out that stringent disqualification rules are not precise enough to figure out the often unapproachable question of what actual bias is and when it is present).

193. See Julie A. Robinson, *Judicial Independence: The Need for Education About the Role of the Judiciary*, 46 WASHBURN L.J. 535, 539 (2007). "[T]he founders, in their considered and educated judgment, determined that on [the] balance, the need for a judiciary free of political or undue influence necessitated a judiciary that could render decisions without allegiance to the popular opinions or the most vocal proponents in the community." *Id.* at 540.

194. Meiser, *supra* note 27, at 1828.

195. See Lewis, *supra* note 30, at 385.

196. See *Lochner*, *supra* note 32, at 231–32.

197. *Id.*

198. Meiser, *supra* note 27, at 1834.

considering judicial reform to add on to the *Caperton* framework.¹⁹⁹ No system can ever be perfect and not every decision can be free of any sort of bias or prejudice.²⁰⁰

I wholeheartedly agree that a judge should be disqualified in cases where actual bias or prejudice exists due to campaign contributions. However, to assume that every judge will be biased is a plunge I am not willing to take. In order for this new judicial disqualification rule to succeed, the Court needs to provide more guidelines or a basic framework so the judiciary can be symmetrical and fair throughout.²⁰¹ The way the new disqualification rule is written, judges might disqualify themselves when it is *not* needed or not disqualify themselves when it *is* needed. Furthermore, judges need to know how much a donor needs to contribute to the judicial campaign before the individual is considered a big donor and what exactly is considered a large campaign contribution. The forty fundamental questions Chief Justice Roberts proposed in his dissenting opinion will need to be addressed in later decisions by the Court because if judges have to consider these factors before even hearing any facts of a case, it might cause our judicial system to come to a complete standstill.²⁰²

Currently, judges at the state or federal level are not required to provide any written or oral reasons as to why they are denying a litigant's motion for disqualification.²⁰³ This has always been a major problem in our judicial system because it creates uncertainty and does not provide any clarity to the litigant who requested the disqualification.²⁰⁴ Thus, if the Supreme Court were to hand down a decision expressly requiring judges to give written or oral reasons as to why they are denying a litigant's motion for disqualification, it could be a better solution than the one *Caperton* has surmised. The decision in *Caperton* was a good start in the right direction to finally put an end to any sort of judicial bias or prejudice that takes place, but since the Court failed to set up a workable framework for judges to follow, it might end up being a major setback. Therefore, I believe all the unnecessary *Caperton* disqualification motions that will be filed as a result of this decision will become a major epidemic in our country and one in which we certainly do not need.

199. *Id.*

200. *Id.*

201. *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2267 (2009) (Roberts, C.J., dissenting).

202. *Id.* at 2269–72.

203. Cravens, *supra* note 37, at 29.

204. *See id.*